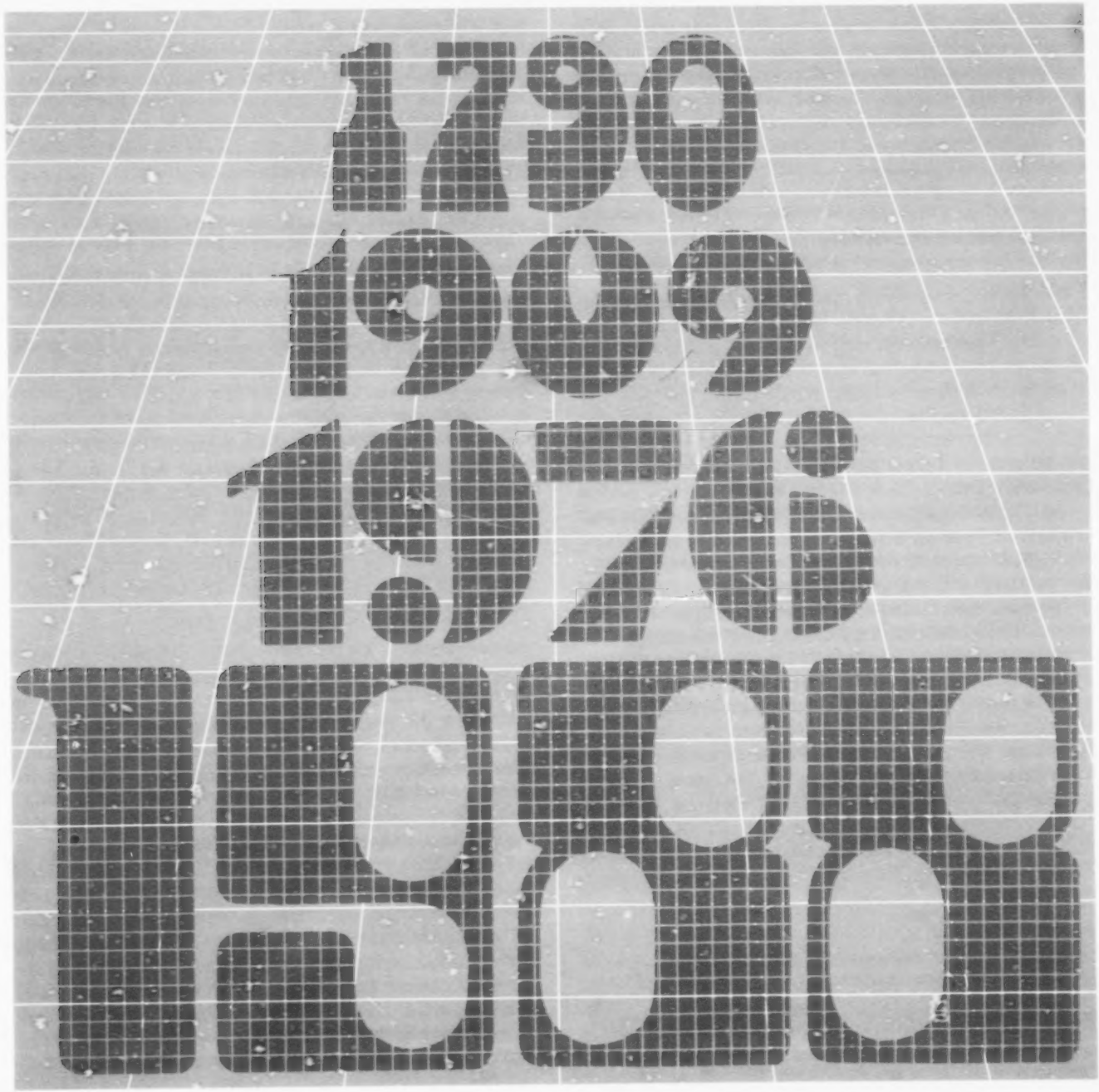
93a

Circular

93a

The United States Joins The Berne Union



The United States Joins The Berne Union

On March 1, 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works. On the same day, amendments to the U.S. copyright law went into effect that bring U.S. law into conformance with this convention. In adhering to the Berne Convention (Paris text, 1971)[1] the United States joins the Berne Union, a prestigious association of 79 member countries linked together in a single unit. Thus the United States makes available to its nationals copyright protection in foreign countries under the laws of member nations of the Union, and in the same manner, foreign works covered by the Berne Convention become eligible for copyright protection in the United States under the amended copyright law.

WHAT IS THE BERNE CONVENTION?

The Berne Convention is the oldest multilateral copyright treaty in existence and has the highest recognized standard of copyright protection among such treaties. In adhering to the Berne Convention, the United States obtains copyright relations with an additional 25 countries. Like the Universal Copyright Convention,[2] the Berne Convention is a general treaty covering broad categories of works and broad exclusive rights rather than one that addresses only certain categories and rights.

The original Convention for the Protection of Literary and Artistic Works was signed at Berne, Switzerland, on September 9, 1886, and entered into force on December 5, 1887. One hundred and two years later, the Berne Union welcomes the United States as its eightieth member. Its membership is wide and diverse, including both developing and developed countries. The Berne Union counts each country of the European Economic Community as a member, many of them founding members. Although Japan and Canada are members, the Americas and the Far East are less widely represented than are Europe and Africa. China and the Soviet Union are the major nonsignatories. The Berne Convention has undergone major revision five times to meet changed conditions and technological developments affecting authors' rights, with each successive text generally improving and extending the rights of authors and copyright proprietors.

[1] Unless noted otherwise, reference to the Berne Convention means the 1971 Paris Act of the Berne Convention.

[2] The United States is a founding member of the other worldwide, multilateral copyright treaty, the Universal Copyright Convention ("UCC"), which came into force in 1955. The United States remains a member of the UCC.

BERNE CONVENTION IMPLEMENTATION ACT OF 1988

U.S. legislation implementing the Berne Convention (P.L. 100-568, 702 stat. 2853 (October 31, 1988)) is the product of a decade of protracted international study and debate. Efforts to join the Berne Convention had been made, with varying intensity, since the general revision of the copyright law became effective in 1978. An Ad Hoc Committee, organized under the auspices of the Department of State, examined the compatibility of U.S. law and the Berne Convention and reported its findings in 1985.

Philosophy of U.S. Implementing Legislation

The consensus achieved in passing legislation that enabled the United States to adhere to the Berne Convention was made possible by an agreement on two objectives: 1) to use a minimalist approach and amend the U.S. Copyright Act only where there was a clear conflict with the express provisions of the Berne Convention, and 2) to amend the law only as much as was necessary to resolve the conflict in a manner that respected the preexisting balance of rights and limitations achieved in the 1976 Copyright Act. At the same time, as a new member of the Berne Union, the United States endorses the principles and specific objectives of the Berne Convention. It has concluded that the changes in our national law made by the Berne Convention Implementation Act of 1988 are sufficient to bring U.S. law into compliance with the convention's requirements.

Proscription Against Self-Execution

Whether the Berne Convention is self-executing (automatically effective) in the United States was one of the predominant issues considered by Congress in passing implementing legislation. If the convention were self-executing, the United States needed only to ratify the treaty, with no further action required to make the convention requirements automatically part of the U.S. copyright law. If the convention were not self-executing, legislation would be necessary to bring U.S. law into compliance with the Berne requirements.

The laws of the country determine whether or not the Berne Convention is self-executing in that country. Congress concluded that the Berne Convention is not self-executing in the United States. The implementation act embodies this conclusion. The convention therefore cannot be applied directly and does not itself confer any rights.

The Moral Rights of Authors

Moral rights generated the most extensive debate surrounding U.S. adherence to the Berne Convention. These rights are separate from the economic rights of an author and concern what are usually called rights of paternity and of integrity. The right of paternity is the right to be named as author of a work; the right of integrity is the right to object to distortion, other alteration of a work, or derogatory action prejudical to the author's honor or reputation in relation to a work.

Article 6*bis* of the convention provides that authors shall have rights of paternity and integrity. Congress concluded that the present law, including unfair competition law and state and common law protection, provides sufficient moral rights to fulfill the obligations of the Berne Convention. Therefore, it is not necessary for the implementation act to include additional moral rights.

Adherents to the Berne Convention may not impose formal requirements (formalities) that restrict "the enjoyment and the exercise" of rights of authors outside the country of origin of the work.

Registration Pursuant to 17 U.S.C. §408

Registration creates a public record of the facts of a particular copyright. For works whose origin is the United States, the implementation act maintains the requirement that copyright claimants seek registration of their works before bringing a lawsuit for copyright infringement. The convention provides that protection in the country of origin is governed by that country's domestic law. Consequently, effective as of March 1, 1989, the implementation act amends section 411(a) of the Copyright Act so as to exempt from registration only those Berne Convention works that have a country of origin other than the United States.

Unless a work can be established as originating in a Berne Union country other than the United States, it must be submitted for registration before any lawsuit for infringement can proceed. This general principle that copyright registration should at least be sought in no way bars the claimant from access to the courts. Whether registration is accepted or refused, the claimant can bring a copyright infringement suit in U.S. court. Under the implementation act, the claimant/plaintiff is responsible for pleading and proving that his or her case comes within the exception for works originating in a foreign country adhering to the Berne Convention. The burden of proof is placed on the copyright claimant, because he or she is more likely than anyone else to have information about the facts of first publication and author nationality.

The implementation act leaves in place the 1976 Copyright Act provisions that encourage all authors or other copyright claimants to register. These provisions reward timely registration with prima facie evidentiary value and make possible the award of statutory damages and attorney's fees in court cases. Specifically, the prima facie evidence that the copyright is valid and the facts in the certificate of registration are true continues to apply where a work is registered before or within five years of first publication. The implementation act also maintains the provision from the present copyright act that a work registered at any time up to three months following first publication may qualify for an award of attorney's fees and statutory damages. As an additional incentive to voluntary registration, moreover, the Berne Convention Implementation Act doubles the statutory damages that a court may award from a range of $250-$10,000 to $500-$20,000.

Renewal Registration

Renewal registration is required before the original term expires for works in which copyright subsisted before 1978. The 1976 Copyright Act changed the general term of copyright to the life of the author plus 50 years, but retained the preexisting system for works federally copyrighted before January 1, 1978, the effective date of the 1976 law. Consequently, renewal registration must be made for pre-1978 works at the end of the initial 28-year term in order to secure copyright for a second term which lasts for another 47 years. This traditional system is maintained in the implementation act, because Congress determined that it would be unfair and confusing to cut off expectancies or alter contractual agreements, some of which may have been in effect for a long time in reliance on this system of renewal and extension. Instead, the renewal provision will be allowed to expire naturally in 2005.

Recordation of Documents

Under the 1976 Copyright Act, any person claiming ownership of a copyright by virtue of a transfer from the author must record in the Copyright Office the instrument of transfer (such as a contract or assignment) before filing a lawsuit for infringement. The implementation act eliminates the requirement of recordation as a prerequisite to suit. The other provisions of the 1976 act that encourage recordation remain the same: those provisions that 1) order the legal presumptions regarding which transfer takes precedence in cases where two or more transfers cover the same rights and 2) give constructive notice to recorded documents that refer to registered works.

Mandatory Deposit

The 1976 Copyright Act makes the Library of Congress the beneficiary of deposits both through permissive registration of published and unpublished works and through mandatory deposit of works published with notice of copyright in the United States. Deposit in the Library of Congress of two copies or phonorecords of the best edition of a work remains mandatory under the implementation act. Failure to deposit is subject to fines but does not affect the copyright status of a work. Therefore, the mandatory deposit provisions are compatible with the provisions of the Berne Convention. The legal deposit laws in many Berne Union countries are similar to the U.S. deposit law. Effective on March 1, 1989, the implementation act extends the mandatory deposit requirement to every work published in the United States that is protected by copyright, whether the work is published with or without notice of copyright.

Notice of Copyright

Notice requirements unchanged for works first published before March 1, 1989. Notice requirements are unchanged for works first published before the effective date of the implementation act. This means that works published without notice of copyright before March 1, 1989, fall into the public domain in the United States unless registration is before or within five years of publication. The implementation act neither expands nor reduces the public domain. Thus, this act does not provide retroactive protection for any work that is in the public domain in the United States.

Mandatory notice of copyright abolished for works first published on or after March 1, 1989. The amendment to the law abolishes mandatory notice of copyright for all works first published on or after its effective date, March 1, 1989. In lieu of the mandatory notice, the copyright law now provides that a copyright notice *may* be placed on all publicly distributed copies and on phonorecords of sound recordings.

Advantages of voluntary use of the notice with respect to evidentiary weight. Voluntary use of the notice is encouraged by according it evidentiary significance: a notice of copyright will defeat a claim of innocent infringement. Under the amended provisions of sections 401 and 402 of the law, where defendants have had access to copies bearing a proper notice of copyright, courts shall not allow them to claim that their infringement was innocent. Certain employees of nonprofit educational institutions, libraries, archives, and public broadcasting entities are excepted from this provision. The implementation act allows these employees to prove innocent infringement. If successful, courts must excuse all their statutory damages.

Notice requirement for U.S. government works abolished. Before March 1, 1989, a work incorporating one or more U.S. government works as a predominant part of the entire work was required to bear a copyright notice which contained a statement to that effect. If such a statement was omitted, the work had to be registered before or within five years of publication to preserve the copyright. The implementation act abolishes this requirement effective March 1, 1989, but the evidentiary benefits of using a voluntary notice cannot be obtained unless the notice on a publication consisting predominantly of a U.S. government work adequately identifies the protected portion.

Artistic Features of Architectural Works and Architectural Plans

Under the 1976 Copyright Act, a work of architecture is protectable if and to the extent that its design incorporates original artistic features that can be identified separately from and can exist independently of the utilitarian aspects of the architectural work. Thus, the functional aspects of a work of architecture are not protected. The implementation act specifically refers to "architectural plans" in listing works illustrative of "pictorial, graphic, and sculptural works," which merely confirms the current law with respect to architectural drawings. Congress has asked the Copyright Office to review the protection architectural works receive under other statutory or common laws in the United States and in other Berne Union countries. After receiving the report of the Copyright Office, Congress may give further consideration to the nature and scope of protection for architectural works.

Public Performances of Nondramatic Musical Works on Jukeboxes

The Berne Convention's Article 11(1) provides that authors of dramatic, dramatico-musical, and musical works have the exclusive right of authorizing the public performance of their works "by any means or process," including both live and recorded musical performances. Section 116 of the 1976 Copyright Act provides for a compulsory license to publicly perform nondramatic musical works by means of coin-operated phonorecord players (jukeboxes). The jukebox compulsory licensing provision of section 116 made the

rate determinable, according to statutory guidelines, by the Copyright Royalty Tribunal.

Negotiated licenses. The implementation act amends the law to provide for negotiated licenses between the user (the jukebox operator) and the copyright owner. In practice, jukebox operators are represented by the Amusement and Music Operators Association, and copyright owners are represented by the music performing rights societies, ASCAP, BMI, and SESAC. If necessary, the parties are encouraged to submit to arbitration to facilitate negotiated licenses. Such licenses take precedence over the compulsory license.

Compulsory license alternative under certain conditions. Although negotiated licenses are preferred, the implementation act authorizes the Copyright Royalty Tribunal to reinstate the compulsory license of section 116 under certain conditions. Additionally, at the end of 1988, the compulsory license remained available to jukebox operators pending negotiations and pending the Copyright Royalty Tribunal's decision on whether the compulsory license will continue to be available one year after March 1, 1989, the effective date of the implementation act. As of March 1990, the Copyright Royalty Tribunal will determine whether negotiated licenses have come into effect "so as to provide permission to use a quantity of musical works not substantially smaller than the quantity of such works performed on coin-operated phonorecord players during the one-year period ending on the effective date of the Act."

As a practical matter, if the jukebox operators' association reaches an agreement with the largest performing rights society, the compulsory license will probably not be available. Collective administration of music performance rights is widely utilized in other countries, and other Berne Union members have made some provision for government oversight of the licensing of musical performances.

BASIC PRINCIPLES OF THE BERNE CONVENTION

The original Berne Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors to bring about better worldwide copyright protection; (2) the removal over time of reciprocity as a basis for rights; (3) the elimination of discrimination in rights against foreign authors in all countries; (4) the reduction of formalities (formal requirements) for the recognition and protection of copyright in foreign works; and, ultimately, (5) the promotion of uniform international legislation for the protection of literary and artistic works.

The first Berne Convention was a simple document in which two cardinal principles were established, both of continuing vitality today: (1) the concept of a union and (2) the rule of national treatment.

The Concept of a Union

The states adhering to the Berne Convention organized themselves into a "union," by which members established a permanent entity constituting a separate cooperative unit that would continue in existence regardless of future entrances into, or withdrawals from, the convention by individual states.

The Rule of National Treatment

The rule of national treatment provides that authors enjoy the same protection for their works in other countries as those countries accord their own authors.

Securing Protection

Authors and others often ask the Copyright Office how they can secure international copyright protection. Although there is no such thing as an "international copyright" that will automatically protect an author's work throughout the entire world, adherence to the Berne Convention brings U.S. authors closer to such an objective. International protection still depends largely on the national laws of the country in which protection is sought and whether or not that country belongs to a treaty or bilateral agreement that obligates it to protect foreign works.

Different international conventions have different criteria for protection. Under the Berne Convention, there are two principal criteria: (1) nationality (the personal criterion) and (2) place of publication (the geographic criterion). The personal criterion assures persons who are nationals of Berne Union countries protection for both their published and unpublished works. Non-nationals who habitually reside in a Berne Union country are protected the same as nationals of that country.

Thus, as of March 1, 1989, U.S. nationals and habitual residents will be entitled to automatic protection in all other Berne Union countries. Likewise, nationals and habitual residents of other Berne Union countries as of March 1, 1989, automatically will become entitled to the protection afforded by U.S. law.

The geographic criterion assures protection for all works that are first or simultaneously published in another Berne Union country. Since the criteria are independent of each other, an author may obtain Berne Convention protection in other member countries by publishing a work for the first time in the United States on or after March 1, 1989. For eligibility purposes, the Berne Convention treats publication in a Berne Union country within 30 days of first publication anywhere as equivalent to first publication in a Berne Union country. This is referred to as "simultaneous" publication.

Before adherence, copyright owners in the United States had long utilized the device of simultaneous publication in the United States and Canada, the nearest Berne member country, to obtain "back-door" protection under the Berne Convention, that is, protection for non-Berne Convention nationals based on first or simultaneous publication in a Berne Union country.

U.S. nationals do not secure Berne Convention protection in the United States. Works by U.S. nationals are not considered "Berne Convention works" with respect to U.S. law. The Berne Convention's rule of national treatment, however, assures that works by U.S. nationals will receive protection in other Berne Union countries based on the minimum standards of the Berne Convention and the principle of national treatment.

HIGHLIGHTS OF THE BERNE CONVENTION

The Berne Convention has three general types of provisions: (1) specific rules that establish rights for authors and proprietors that should be provided for in national laws, either by legislation or direct application, depending on the country's legal system; (2) more general rules that also obligate member countries to adopt national laws consistent with the minimum standards; and (3) optional rights whose adoption is left entirely to the discretion of member countries.

Exclusive of administrative provisions, the Berne Convention contains 20 articles. Together, these articles define the subject matter of protection, set out the points of attachment that give rise to the obligation to protect these works (i.e., basic eligibility), establish the rule of national treatment, enumerate certain minimum rights of authors that must be given effect in national laws, establish specific opportunities to exempt certain uses from the minimum rights guaranteed by the convention, and describe special rights provisions relating to motion pictures.

Berne Convention Subject Matter

In general, the subject matter of protection under the Berne Convention encompasses any original work of authorship "in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." Such works include "painting," "architecture," "photographic works to which are assimilated works expressed by a process analogous to photography," "illustrations," and "three-dimensional works relative to geography, topography, architecture or science, as well as books, dramatic or dramatico-musical works, musical compositions, and cinematographic works."

The Berne Convention requires member countries to provide protection for derivative works and collections of literary and artistic works, but protection of governmental or other official works is made optional for each member state. It excludes "news of the day" or "miscellaneous facts having the character of mere items of press information" from the material to be protected by Berne Convention adherents and distinguishes between nonprotectable facts and protectable original expressions containing "sufficient intellectual effort for them to be considered as literary and artistic works."

Eligibility to Secure U.S. Copyright Extended to Nationals of Berne Convention Members

Article 3 of the Berne Convention establishes the place of first publication and nationality as the principal criteria for a work to become eligible for protection by virtue of the convention. The nationality criterion protects authors who are nationals and habitual residents, including refugees and stateless persons who habitually reside in a Berne Union country. The place of first publication criterion affords eligibility for protection to works by non-nationals of Berne Union countries that are first or simultaneously published in a Berne Union country. In the same vein, artistic features of architectural works that are incorporated into buildings and other permanent structures located in Berne Union countries are eligible for protection based on their location. Additionally, express eligibility for protection is provided for the author of a cinematographic work on the basis of the Berne Union country where the maker has a habitual residence or headquarters, if the maker is a legal entity such as a motion picture production company.

The Berne Convention provides that a work is published when it is made available to the public in sufficient numbers to satisfy the demand for the work, considering the nature of the work itself. Similar to the definition of publication in U.S. law, under the Berne Convention definition, neither perform-

ance, broadcast, exhibition, nor construction (of an architectural work, for example) constitutes publication. Likewise, the Berne Convention does not require that publication take place by a particular means of production, for example, commercial printing, but it does require distribution of material objects (or offering them for sale) rather than mere display or communication to the public.

Article 5 sets out the fundamental principle of national treatment, guaranteeing nondiscrimination to foreign nationals of Berne Union countries in other Berne Union countries.

Prohibition of Formalities Leading to Loss of Copyright

Formalities whose nonobservance leads to loss of copyright cannot be applied to Berne Convention works having a country of origin (generally the Berne member country of publication) other than the country where protection is sought. The convention does not govern protection for works published by nationals in their own country; that protection is governed entirely by that country's domestic law and may be conditioned on formalities whose nonobservance may in turn lead to loss of copyright.

Application of Different Texts of the Berne Convention

The original Berne Convention became effective on December 5, 1887. Since then, the convention has been revised five times. Thus, there are five separate Berne Convention texts: the Berlin Act of 1908, the Rome Act of 1928, the Brussels Act of 1948, the Stockholm Act of 1967, and the Paris Act of 1971. In general, each successive revision resulted in additions to the scope or nature of protection provided for authors. For example, the Berlin Act prohibited formalities as a condition for copyright protection; the Rome Act established moral rights for authors; the Brussels Act specifically recognized a number of additional rights and required that copyright last for a term of 50 years from the death of the author. The Stockholm Act gave habitual residents of a country the same rights as nationals of that country and also introduced a set of provisions for the benefit of developing countries that were members of the Berne Union. The above provisions were modified and incorporated into the Paris Act, to which the United States accedes.

Berne Union members adhering to the earlier texts are not required to ratify later acts, but the latest text is the only one available to new members. Nevertheless, members of the Berne Union form a single cohesive whole. Linked together with other members of this separate cooperative unit, the United States is obligated to give convention protection to other members of the union who have adhered to earlier texts. By the same token, members adhering to earlier texts have Berne Convention obligations to protect those who adhered to later acts.

Duration of Protection

The Berne Convention contains a number of articles establishing minimum terms of protection that must be provided by the laws of member countries. The general term of protection is the life of the author plus 50 years following his or her death. Special minimum terms apply to cinematographic works: the term is 50 years after the work has been made available to the public or, if it is not made public, 50 years after creation. Anonymous and pseudonymous works also receive a term of 50 years after the work is lawfully made available to the public. Where there is no doubt as to the identity of the author, the term that is to be provided for an anonymous or pseudonymous work is life of the author plus 50 years. Where it is reasonable to presume that an unidentified author has been dead for more than 50 years, the Berne Convention does not require that countries continue to protect the work.

As an exception to the general minimum term of the life of the author plus 50 years, the Berne Convention requires that photographic works and works of applied art receive a minimum term of 25 years from the making of such a work.

Exclusive Rights

The Berne Convention requires member countries to provide certain exclusive rights, among them: the right of reproduction, including sound and visual reproductions; the right of adaptation; and the right of public recitation and public performance. A member country's legislation may impose limitations on the rights of authors that require compulsory licenses for the broadcasting and public communication rights, subject to equitable remuneration for such use; a compulsory license for the mechanical reproduction of music; and certain narrow limitations on the rights of public performance and public communication of performances. The Berne Convention requires member countries to provide a system of protection for cinematographic works that covers the rights of contributors to the motion picture.

Use "Compatible with Fair Practice"

In general, Berne Union states may permit reproduction of works in special cases where reproduction neither interferes with the normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author. The Berne Convention permits member countries to allow "quotations" from publicly distributed works if "their making is compatible with fair practice" and the quantity used does not exceed that justified by the purpose. Other special exemptions are permissible that allow the news media to reproduce articles on "current economic, political, or religious topics" and allow them to reproduce and make available to the public literary or artistic works seen or heard in the course of reporting current events.

DOES U.S. ADHERENCE TO THE BERNE CONVENTION AFFECT UCC OBLIGATIONS?

Accession to the Berne Convention does not affect U.S. membership in other multilateral conventions, the most important of which is the Universal Copyright Convention (UCC). Both conventions require national treatment, cover wide categories of works, and have some degree of overlapping country membership.

In 1948, on the occasion of the Brussels revision of the Berne Convention, Berne Union members and the United States explored their mutual interest in U.S. adherence to the Berne Convention. At the time, however, the U.S. copyright law was incompatible with the convention in three important respects: duration of copyright, the manufacturing clause, and the copyright notice formality. Since it did not seem possible at that time to either change U.S. law or to alter the Berne Convention to accommodate U.S. interests, the United States explored the possibility of a new international convention that it could join. The end result was the creation of the UCC.

Notwithstanding U.S. adherence to the Berne Convention, the UCC will have continuing viability and will continue to provide copyright protection for U.S. works in certain countries. In 1988, 25 member states of the UCC, including the Soviet Union and a large number of our Central American and Caribbean Basin neighbors, were not party to the Berne Convention. Thus, the UCC remains important because it affords a multilateral basis for protecting U.S. works in certain non-Berne Union countries and because it furthers the goal of achieving global copyright coverage.

Copyright Office • Library of Congress • Washington, D.C. 20559

February 1989 - 25,000

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-429/80,031